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In the
Texas Court of Criminal Appeals
at Austin

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COURT OF CRIMINAL APPEALS
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No. 14-15-00502-CR
In the Court of Appeals for the
Fourteenth District of Texas
at Houston

JOSEPH ANTHONY SMITH

Appellant

V.

THE STATE OF TEXAS

Appellee

STATE'S REPLY BRIEF ON DISCRETIONARY REVIEW

KIM OGG
District Attorney
Harris County, Texas

BRIDGET HOLLOWAY
Assistant District Attorney
Harris County, Texas
Texas Bar No. 24025227
holloway_bridget@dao.hctx.net

JENNIFER MERIWETHER
Assistant District Attorney
Harris County, Texas

Harris County Criminal Justice Center
1201 Franklin, Suite 600
Houston, Texas 77002
Tel.: 713.274.5826

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below:

Complainant, victim, or aggrieved party:

Gillermo Weiner

Counsel for the State:

Kim Ogg — District Attorney of Harris County

Bridget Holloway — Assistant District Attorney on appeal

Molly Wurzer —Assistant District Attorney on intermediate appeal

Jennifer Meriweather —Assistant District Attorney at trial

Julie Grandt —Assistant District Attorney at trial

Appellant or criminal defendant:

Joseph Anthony Smith

Counsel for Appellant:

Sarah V. Wood —Assistant Public Defender on appeal

Robert Scardino —Defense counsel at trial

J. Philip Scardino —Defense counsel at trial

Trial Judge:

Honorable Reagin Clark — Presiding Judge over trial

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

Appellant, Joseph Smith, was charged by felony indictment with aggravated robbery. (CR at 12). After a hung jury resulted in a mistrial, another jury found appellant guilty as charged. (CR at 390, 427-28; RR3 at 223). The jury assessed appellant's punishment at confinement for life. (CR at 424-25; RR5 at 34-35; RR7 at 211). The Fourteenth District Court of Appeals affirmed appellant's conviction in a published opinion ("majority") delivered on March 8, 2017. Justice Jewell issued a published plurality, concurring, and dissenting opinion ("concurring"). And, finally, Justice Christopher issued a published concurring and dissenting opinion ("dissent"). *See Smith v. State*, 522 S.W.3d 628 (Tex. App. —Houston [14th Dist.] 2017, pet granted).[1]

This Court granted the following three grounds for review on December 13, 2017:

1. The court of appeals employed the wrong analysis when reviewing the record to determine whether a "voluntary intoxication" instruction was error to include in Appellant's punishment-phase jury charge.

2. The inclusion of an 8.04(a) instruction at punishment violates the Due Process Clause because it could mislead a rational jury into

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[1] All three opinions last accessed from TexCourts.gov on May 30, 2018. Motions for rehearing (May 23, 2017) and en banc reconsideration (June 20, 2017) were denied.

believing that it could not — as a matter of law — consider a defendant's drug-addiction evidence as mitigation; thus the court of appeals's holding that it is not a charge error conflicts with applicable holdings of the U.S. Supreme Court.

3. In its harm analysis of the State's unconstitutional jury argument, the court of appeals did not address how that argument highlighted inadmissible evidence and how it impermissibly increased the likelihood that the jury punished Appellant for an extraneous crime.

The intermediate appellate court did not employ the wrong standard of review by reviewing the jury charge for jury confusion in its error analysis. The inclusion of the "voluntary intoxication" (TEX. PENAL CODE ANN. § 8.04(a)) instruction was necessary to give the jury some guidance on how they could consider the evidence of voluntary intoxication. If the inclusion of the instruction was erroneous, appellant did not suffer "some" actual harm after consideration of the entire record, including the charge, the evidence presented at trial, and the arguments of the parties. Appellant never challenged due process in either the trial court or the intermediate appellate court. Finally, in light of all the evidence, the State's one-line comment to the jury about appellant's lack of remorse did not contribute to appellant's punishment

STATEMENT OF FACTS

A. AGGRAVATED ROBBERY

On February 13, 2012, Guillermo Wiener left his house a little after 5:00 a.m. (RR4 at 51). He began pulling out of the driveway and was near the street when appellant approached the driver's side of the car. (RR4 at 52, 69). Appellant was holding a gun at the window and knocked it on the glass. (RR4 at 52).

Wiener thought he was being robbed, so he got out of the car. (RR4 at 54). Before appellant had a chance to say anything, Wiener handed his wallet and keys to appellant. (RR4 at 54, 73). Wiener said, "Please take my wallet and my keys. Please don't hurt me." (RR4 at 54). Appellant said, "I'm not going to kill you" and then asked if anyone else was at home. (RR4 at 55).

Appellant told Weiner to get back in the car. (RR4 at 55). At that moment, another car drove down the street. (RR4 at 56). Both Wiener and appellant were distracted by it. (RR4 at 56-57). Then, Wiener noticed the gun was no longer pointing right at his face, so he grabbed the gun with both of his hands and started screaming for help. (RR4 at 57). Appellant wrapped his arm around Wiener and tried to muffle his screams with his hand. (RR4 at 57). They ended up struggling in the middle of the street in front of the approaching car. (RR4 at 58). The car did not stop. (RR4 at 59).

At this point, Blaine Streeter, Wiener's neighbor, came out. (RRIV at 59). He had heard screaming and seen the struggle on the street, so he grabbed his gun and called 911. (RR4 at 25-26). He drew his gun on appellant and made verbal commands. (RR4 at 30, 33). Appellant dropped the gun. (RR4 at 59). Wiener picked up the gun, and appellant began to run down the street. (RR4 at 59). Wiener ran into the house. (RR4 at 60).

Streeter ran after appellant, ordering him to get on the ground. (RR4 at 30). Appellant did not stop, and Streeter lost sight of him. (RR4 at 30). Another neighbor followed appellant. (RR4 at 31). Streeter heard shots fired, and saw the neighbor bringing appellant back around the side of the house. (RR4 at 32).

Wiener's wallet was found lying in the grass near the driveway. (RR4 at 61-62; State's Exhibit 9). Bellaire Police Officer Salinas found a pair of gloves and some cash in the backyard where the neighbor found appellant. (RR4 at 90-91; State's Exhibits 11-13). When the officer examined the gun Wiener took from appellant, he observed a live round in the chamber and four rounds in the magazine. (RR4 at 91-92).

Soon after appellant was booked into custody, he made two jail calls to a woman. (State's Exhibit 22). In these calls, he explained he was charged with aggravated robbery. (State's Exhibit 27). He said he tried to shoot Wiener, but

the weapon jammed. (State's Exhibit 27). Poppa, his co-conspirator, was in the car, drove by, looked him in the eyes while he struggled with Wiener, and then "burned off." (State's Exhibit 27).

B. Extraneous Offenses (Including Capital Murder)

Evidence of a capital murder was presented in the punishment phase. On February 12, 2012, a day before the charged offense, Hong Le's naked body was found behind an abandoned duplex. Le had no wallet or phone on or near him. (RR6 at 80, 82-83, 116, 142, 160). He had been shot six times with a firearm. (RR6 at 60, 62, 73). Appellant's prints were in Le's car. (RR6 at 213-17; State's Exhibit 160, 165). Appellant told a neighbor he had shot an Asian man that morning. (RR6 at 269-70).

In jail calls, appellant discussed trying to get out and disconnect himself from the evidence. (State's Exhibits 26-27). Appellant assaulted Edwin Lopez, a neighbor and friend, multiple times in February 2012, because he was jealous about a girl. (RR6 at 72-73, 97-102, 268). Appellant also admitted to selling drugs. (RR7 at 148-49).

Even after he was confined, he continued to create problems in the Harris County Jail, including fighting, refusing to obey orders, group demonstration, tattooing, and an assault on another inmate. (State's Exhibits 173-80). Perhaps

most tellingly, appellant got angry when he was placed in a pod with other inmates. (RR6 at 52-54; RR7 at 161). When he was told he was not classified to have a cell to himself, he beat another inmate unconscious in the view of a detention officer so that he could be segregated in a cell by himself. (RR6 at 53-55; RR7 at 161).

C. Defense Evidence of Appellant's Xanax Addiction

The defense called Dr. Terry Rustin, a doctor with experience in Xanax addiction. (RR7 at 120-22). He testified that Xanax causes a reduction of inhibitions and can promote risky and impulsive behavior. (RR7 at 124-25). He was sent by the defense attorney to speak with appellant in jail. (RR7 at 121). Appellant self-reported to Dr. Rustin that he was using up to eight Xanax tablets a day. (RR7 at 125, 136). He did not have a prescription for Xanax. (RR7 at 125-26). It is common for people taking high doses of Xanax to commit serious crimes, but it does not excuse or condone their behavior. (RR7 at 133).

APPELLANT'S THREE GROUNDS FOR REVIEW

Ground One: The court of appeals employed the wrong analysis when reviewing the record to determine whether a "voluntary intoxication" instruction was error to include in Appellant's punishment-phase jury charge.

Ground Two: The inclusion of an 8.04(a) instruction at punishment violates the Due Process Clause because it could mislead a rational jury into believing that it could not — as a matter of law — consider a defendant's drug-addiction evidence as mitigation; thus the court of appeals's holding that it is not a charge error conflicts with applicable holdings of the U.S. Supreme Court.

Ground Three: In its harm analysis of the State's unconstitutional jury argument, the court of appeals did not address how that argument highlighted inadmissible evidence and how it impermissibly increased the likelihood that the jury punished Appellant for an extraneous crime.

STATE'S RESPONSE TO APPELLANT'S FIRST GROUND

Restated Ground One: The court of appeals employed the wrong analysis when reviewing the record to determine whether a "voluntary intoxication" instruction was error to include in Appellant's punishment-phase jury charge.

In his first ground for review, appellant argues the Fourteenth Court of Appeals' majority opinion used its own standard of review and wrongly concluded there was no error in the trial court including a section 8.04(a) instruction in the jury charge during punishment. He further argues the concurrent opinion wrongly decided that any error in the submission of the instruction was harmless. Because the intermediate appellate court did not employ the wrong standard of review by reviewing the jury charge for jury confusion in its error analysis, because the inclusion of the "voluntary intoxication" (TEX. PENAL CODE ANN. § 8.04(a)) instruction was necessary to give the jury some guidance on how they could consider the evidence of voluntary intoxication, and because, if the inclusion of the instruction was erroneous, appellant did not suffer "some" actual harm after consideration of the entire record, including the charge, the evidence presented at trial, and the arguments of the parties, the majority and/or concurring opinions should be upheld.

APPLICABLE LAW

A. Voluntary Intoxication

Section 8.04 of the Texas Penal Code states that:

> (a) Voluntary intoxication does not constitute a defense to the commission of crime.
>
> (b) Evidence of temporary insanity caused by intoxication may be introduced by the actor in mitigation of the penalty attached to the offense for which he is being tried.
>
> (c) When temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was caused by intoxication, the court shall charge the jury in accordance with the provisions of this section.
>
> (d) For purposes of this section, "intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

TEX. PENAL CODE ANN. § 8.04(a-d).

B. Standard of Review

A jury charge should set forth the law applicable to the case, without expressing any opinion the trial court may have regarding the weight of the evidence and without summarizing any testimony or otherwise discussing the evidence presented. TEX. CODE CRIM. PROC. ANN. art. 36.14. "The function of a jury charge is not merely to avoid misleading or confusing the jury, but to lead and

to prevent confusion." *Sakil v. State*, 287 S.W.3d 23, 26 (Tex. Crim. App. 2009) (internal citations omitted).

A review of an alleged jury charge error involves a two-step process. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). First, a determination of whether error occurred is made, and then, second, "whether sufficient harm resulted from the error to require reversal." *Id.* at 731–32; *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). The level of harm that must be shown as having resulted from the erroneous jury instruction depends on whether the appellant properly objected to the error. *Abdnor*, 871 S.W.2d at 732. When a proper objection is made at trial, as here, a reversal is required if there is "some harm" "calculated to injure the rights of defendant." *Id.*

C. Relevant Facts

During the formal charge conference in the punishment phase, trial counsel objected to the inclusion of an involuntary intoxication instruction in the charge:

> **Trial counsel**: ...We object to the submission of an involuntary intoxication charge that's been submitted by prosecution and the Court has included. We take the position it's not appropriate in the punishment stage of the trial. It might be appropriate in guilt/innocence, but we never took the position that he was somehow incapacitated in such a way that he didn't reach the mens rea level to commit the crime.

This voluntary intoxication charge, basically, takes away the expert witness Rustin's testimony completely. It's telling the jury just to ignore it. And we never asked him if it was an excuse for the crime. We just asked him if it affected the defendant, what affect the Xanax has.

I would submit to the Court that it's appropriate for the defense to submit evidence to a fact-finder as to what may be mitigating and help the fact-finder reach an appropriate punishment.

This voluntary intoxication charge takes away from us, and we object.

State: And brief, response, Your Honor. The charge which counsel is referring to is simply being requested by the State given that there was testimony and evidence that the defendant was under the influence of Xanax, or handlebars, during the guilt/innocence phase in State's Exhibit 26. All of that evidence was also reoffered for the punishment phase as well. Now that Dr. Rustin has testified, it has given it context as to what handlebars are.

We simply ask that this instruction be included so that the jury doesn't recognize or excuse the defendant's behavior on the aggravated robbery. I do recognize that Dr. Rustin can easily testify to the idea that this is mitigation, that he's on these substances at some point. But this saves us from any concerns over the aggravated robbery in excusing his behavior by having this charge.

Court: I'm going to allow y'all to argue the mitigation aspect of this, but I'm going to leave this charge in there, because I don't want the jury, as the prosecutor just stated, to become confused to think that because he was on some drug, and it might have messed his mind up, that the punishment should be diminished to the point to where there could be no punishment. So I'm going to leave it in.

(RR7 at 163-65). The trial court instructed the jury that "[v]oluntary intoxication does not constitute a defense to the commission of a crime. 'Intoxication' means disturbance of mental or physical capacity resulting from the introduction of any substance into the body." (CR at 413).

ANALYSIS

A. Standard of Review Employed by Intermediate Appellate Court

Appellant first argues the Fourteenth Court of Appeals failed to employ the appropriate "charge error" analysis "in *Almanza v. State*" by employing its own "jury confusion" analysis. There is no merit to this argument. As argued below, the majority first concluded the jury charge *correctly stated the law* "that voluntary intoxication is not a defense to the commission of a crime." *See Smith*, 522 S.W.3d at 633. After finding the correct statement of the law "unnecessary" and "out-of-place," the majority also noted the charge never told the jury to disregard any evidence of voluntary intoxication, and instead instructed the jury to *consider all evidence*. *See id.* Because of these conclusions, the majority held the instruction, alone, did not amount to automatic error. *See id.* Disagreeing with the concurring and dissenting justices, the majority also noted that this Court's opinion in *Taylor v. State*, 885 S.W.2d 154 (Tex. Crim. App. 1994) did not say that a section 8.04(a)

instruction in the punishment-phase automatically amounted to error. *See Smith*, 522 S.W.3d at 633-34.

Only after determining automatic error did not exist solely because of an "unnecessary" and "surplus" instruction, the majority then took a "look at the reasons it would be wrong to include the instruction in the charge. If those reasons are implicated, then the inclusion of the out-of-place instruction cannot fairly be characterized as error."[2] *See id.* at 634. Because appellant argued "jury confusion over the ability to consider mitigating evidence as the reason the trial court erred in including the challenged instruction," the majority's next step in its analysis was to review whether the jury could have been confused. *See id.* ("In this context, jury confusion would equate to charge error.").

Appellant argues reviewing the record for jury confusion is not an adequate test for jury charge error and is "more pertinent to the harm analysis." Appellant also argues that even a correct statement of the law can be erroneous if it is a comment on the weight of the evidence. Although the trial court did not cite to any authority, analyzing the jury charge for jury confusion was not "seemingly of

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[2] The only argument made on appeal to the intermediate appellate court was that section 8.04(a) belonged solely in guilt/innocence jury charges (citing to this Court's *Taylor* opinion) and error, therefore, was automatic. Appellant's Brief at 18-19 (last accessed May 30, 2018). Appellant argued "jury confusion" under the "nature of the error" in his attempt to show harm. *See id.*

[the intermediate appellate court's] own design," but is a long standing principle regarding the review of a jury charge and its proper function:

> It is not the function of the charge merely to avoid misleading or confusing the jury: it is the function of the charge to lead and to prevent confusion. A charge that does not apply the law to the facts fails to lead the jury to the threshold of its duty: to decide those fact issues. A charge that leaves application of the law to the facts solely in the hands of the partisan advocates does not guard against the confusion that such partisan claims inspire. Because a charge should affirmatively lead and dispel confusion, and because a charge that does not apply the law to the facts fails to give such guidance, error of this character should remain the subject of a per se rule.

Williams v. State, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977); *Sakil*, 287 S.W.3d at 26 (applying a jury confusion analysis upon reviewing the guilt/innocence jury charge for error);[3] *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). Thus, the intermediate appellate court did not employ the wrong standard of review by reviewing the jury charge for jury confusion in its error analysis.

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[3] "By instructing the jury that voluntary intoxication does not constitute a defense to assault, the trial judge properly utilized the charge's function to actively prevent confusion. Therefore, the inclusion of the contested instruction did not constitute error." *Sakil*, 287 S.W.3d at 28.

B. Section 8.04(a) Instruction on Voluntary Intoxication in Punishment Charge Not Error

Here, appellant did not assert voluntary intoxication as a defense to the charged offense. Instead, the only punishment defense he presented to the jury was that voluntary intoxication —Xanax addiction— was the probable cause of his commission of the charged offense and all proffered extraneous and bad acts, including a murder. The majority properly concluded the jury charge correctly stated the law "that voluntary intoxication is not a defense to the commission of a crime." *See Smith*, 522 S.W.3d at 633 (citing TEX. PENAL CODE § 8.04(a)). The majority believed, however, the correct statement of the law "did no work in the punishment-phase charge" and cited to this Court's opinion in *Haley v. State*, 173 S.W.3d 510 (Tex. Crim. App. 2005) and distinguished the dissent's reliance on *Taylor v. State*, 885 S.W.2d 154 (Tex. Crim. App. 1994).

In *Haley*, the defendant complained of the admission of extraneous offense evidence during punishment that failed to establish she was criminally responsible under the law of parties. *Id.*, 173 S.W.3d at 511. This Court found that during the punishment phase, the jury does not determine a defendant's guilt of any criminal offense, including whether any extraneous or bad act constitutes a criminal offense. *Id.*, 173 S.W.3d at 514-15 ("the punishment phase requires the jury only

find that these prior [extraneous] acts are attributable to the defendant beyond a reasonable doubt"). Thus, the majority concluded that although the voluntary intoxication instruction was "unnecessary" and "out-of-place," it still accurately stated the law and had no applicability to any decisions made by the jury because the jury is not tasked with determining a defendant's guilt to the commission of any criminal offense during the punishment-phase. *See Smith*, 522 S.W.3d at 633.

Taylor set out guidelines for use of voluntary intoxication under section 8.04 in the jury charge:

> Subsection (a) of section 8.04 is directed to the guilt/innocence phase of trial (per the use of the word "defense"), essentially providing that voluntary intoxication will not excuse a defendant's actions.
>
> Subsection (b) is a punishment provision, specifically providing that a defendant may introduce evidence of temporary insanity caused by intoxication for purposes of mitigating his punishment.
>
> Subsection (c) is a "charge" provision, designating circumstances in which a jury instruction must be given. We interpret subsection (c) as setting forth only *certain* circumstances in which a trial court must give an instruction. Subsection (c) does not *preclude* the giving of an instruction if circumstances, different than those outlined in subsection (c), otherwise raise an issue in either subsection (a) or (b).

Taylor, 885 S.W.2d at 157. The concurring and dissenting opinions relied on *Taylor* to conclude that section 8.04(a) "does not belong in the punishment charge." *See*

Smith, 522 S.W.3d at 640 (Jewell, J., concurring); *Id.* at 648 (Christopher, J., dissent). *Taylor*, however, dealt with whether a subsection (a) instruction was proper in the guilt/innocence phase even though the defendant was not relying on intoxication as a defense. *Id.*, 885 S.W.2d at 158. The majority, in response to the dissent, noted this Court "did not say that including a section 8.04(a) instruction in a punishment-phase charge automatically amounts to error." *See Smith*, 522 S.W.3d at 633-34. And, as the majority explained, even assuming the instruction was "out-of-place," does not mean its automatic error. *See id.* at 634.

In addition to the majority's opinion, the State maintains the instruction was correct for an additional reason:

> Article 36.14 of the Code of Criminal Procedure requires a judge to deliver to the jury "a written charge distinctly setting forth the law applicable to the case." [TEX.] CODE CRIM. PROC. ANN. art. 36.14 (Vernon 2007). But what criteria qualify a statement of law as being "applicable to the case"? Some information, such as the elements of the charged offense, must appear in the jury charge and is without question "the law applicable to the case." 43 George E. Dix & Robert O. Dawson, CRIMINAL PRACTICE AND PROCEDURE § 36.11 (2d ed. 2001). But a Section 8.04(a) instruction need not appear in every jury charge, and therefore, there is no sua sponte duty to instruct the jury on that issue, *but the judge may do so, if the question of voluntary intoxication applies to the case. See Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007).

Sakil, 287 S.W.3d at 26 (footnote omitted) (emphasis added). *Taylor* also held that "if there is evidence from any source that might lead a jury to conclude that the defendant's intoxication somehow excused his actions, an instruction is appropriate." *See Smith*, 885 S.W.2d at 158 (citing *Taylor*, 885 S.W.2d at 158); *Sakil*, 287 S.W.3d at 26 (same citation to *Taylor*).

Here, the voluntary intoxication instruction was requested by the State in the punishment-phase in direct response to appellant's witness, Dr. Rustin, who testified in a manner that attempted to explain appellant's extraneous or bad actions, as well as the charged offense, on a Xanax addiction. (RR7 at 119-61). As the trial judge observed, there was a possibility for juror confusion:

> I'm going to allow y'all to argue the mitigation aspect of this, but I'm going to leave this charge [on voluntary intoxication] in there, because I don't want the jury, as the prosecutor just stated, to become confused to think that because he was on some drug, and it might have messed his mind up, that the punishment should be diminished to the point to where there could be no punishment. So I'm going to leave it in.

(CR7 at 165).

By appellant not only presenting evidence of his drug addiction, but specifically that it was the probable cause of his criminal, extraneous, and bad acts, there was some evidence warranting submission of the instruction to the jury. To hold otherwise, particularly under the facts presented here, would allow

the possibility for a defendant to essentially attempt to "re-litigate" guilt/innocence.[4]

Additionally, by appellant not claiming that evidence of his voluntary intoxication lead to temporary insanity, a section 8.04(b) instruction was not warranted, and appellant could only hope to benefit from the jury not knowing that evidence of voluntary intoxication, while mitigating, is not an acceptable legal defense to any of the alleged offenses or bad acts, including the charged offense. The section 8.04(a) instruction immediately preceded the "mere presence" evidentiary instruction ("the mere presence of the defendant at the scene of the offense is not sufficient to conclude that the accused committed the offense beyond a reasonable doubt").[5] (CR at 413-14). Both of these instructions were

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[4] Although this is technically impossible, it is theoretically conceivable depending on the evidence presented by the defense during punishment.

[5] Appellant never claimed that the evidentiary instruction on "mere presence" was improper, even though it also would normally properly belong in the guilt/innocence charge. In fact, the Third Court of Appeals held that it is sometimes necessary to include this evidentiary instruction normally belonging in a guilt/innocence charge in the punishment charge. *See Haley v. State*, 113 S.W.3d 801, 814 (Tex. App. —Austin 2003) (holding punishment phase jury charge was erroneous, misleading, and incomplete because it "allowed the jury to consider to evidence of [the extraneous offense] in assessing appellant punishment if appellant 'participated in such transaction' without instructing the jury that 'participation" in the [extraneous offense] was not legally sufficient unless the appellant was criminally responsible...as a party") *aff'd on related grounds* 173 S.W.3d 510 (Tex. Crim. App. 2005) (in affirming, however, this Court did not consider whether the Austin Court of Appeals erred by holding that the trial court

followed by the instruction that the jury may consider extraneous crimes only if they were proven beyond a reasonable doubt. (CR at 413-15). Thus, under the circumstances, it was necessary to give the jury some guidance on how they could consider the evidence of voluntary intoxication.

Neither the wording of section 8.04(a), nor its interpretation in *Taylor*, precludes the possibility of including the instruction in a punishment charge. Naturally, it will be less common for an 8.04(a) instruction to be appropriately found in the punishment charge, but it was necessary here to explain the law and the evidence to the jury. *See Taylor*, 885 S.W.2d at 158 ("if there is any evidence from any source that might lead a jury to conclude that the defendant's intoxication somehow excused his actions, an instruction is appropriate").

Appellant argued the voluntary intoxication charge added confusion over the jury's ability to consider his Xanax addiction as mitigating evidence and was, thus, error. The jury, however, was instructed it could consider "all the facts shown by the evidence admitted before you in the full trial of this case and the law as submitted to you in this charge." (CR at 417). As the majority notes, "the

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should have included an instruction on the law of parties).[5] Like the "mere presence" instruction, the voluntary intoxication instruction was necessary to explain the law to the jury, especially in light of the re-offered evidence from the guilt/innocence phase that indicated intoxication and the extraneous offenses admitted in the punishment phase.

evidence included Dr. Rustin's testimony about appellant's voluntary intoxication on Xanax" and "nothing in the charge contradicted the statement that the jury could consider this evidence." *See Smith*, 522 S.W.3d at 634. Thus, the subsequent portion of the punishment charge cured any residual confusion to the voluntary intoxication charge. "To conclude otherwise…would have to say that a charge that tells the jury it can consider all evidence means the jury could not consider some evidence." *Id.* Under the facts of this case, it was not error for the trial court to instruct the jury that "involuntary intoxication is not a defense to the commission of a crime" under section 8.04(a).[6]

Appellant also suggests the instruction that "voluntary intoxication is not a defense" was a comment on the weight of the evidence by singling it out and

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[6] Appellant argued neither at trial nor on appeal that the evidence warranted an instruction under section 8.04(b). TEX. PENAL CODE ANN. § 8.04(b). Indeed, such an instruction would not have been appropriate. In order for a trial court to instruction a jury under sub-section (b) (voluntary intoxication as mitigating evidence), the defendant must establish that he was intoxicated and that the intoxication rendered him temporarily "insane." *See Sawyers v. State*, 724 S.W.2d 24 (Tex. Crim. App. 1986) (evidence showing the defendant was intoxicated and nothing more does not justify submission of an issue on temporary insanity, and refusal to submit such charge in mitigation of punishment is not error). In other words, he must establish that his voluntary intoxication caused him to not know his conduct was wrong. *See id.* Here, appellant called an expert to talk about Xanax and the influence it may have had on him, but he did not attempt to establish that any intoxication rendered him "insane."

instructing the jury not to consider it.[7] This instruction on its face is not a comment on the weight of the evidence. *Lofland v. State*, No. 14-02-01092-CR, 2003 WL 22453816 (Tex. App. —Houston [14th Dist.] October 30, 2003, pet. ref'd) (mem. op., not designated for publication) (holding that voluntary intoxication was not a comment on the weight of the evidence because it was raised by the evidence, identified evidence requiring special jury consideration under the law, set out the law governing such consideration, and did not intimate that any fact issue should be resolved in any certain way or that any evidence be given any greater weight or credibility).

The jury was never instructed, by any means, to disregard the mitigating effect, if any, of appellant's Xanax addiction. The jury was only instructed it was not a defense to any criminal offense while the jury could otherwise consider "all facts shown." Without contrary evidence, it is presumed the jury followed the instructions set out in the charge. *See Hutch*, 922 S.W.2d at 170. The majority opinion was correct in finding no error in the jury charge.

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[7] Although appellant argued to the intermediate appellate court that the instruction was a comment on the weight of the evidence, not one of the three opinions addressed this argument nor relied on that conclusion. Appellant's Brief at 20.

C. Error, if Any, Was Harmless

Assuming this Court finds the trial court erroneously charged the jury on voluntary intoxication, the error was harmless, as analyzed under the concurrent opinion. Because appellant preserved his complaint for appellate review, reversal is only required if the charge error caused "some" actual harm. Appellant argues he was harmed because the error went to his sole defense.

When error is preserved at trial, the error must have been calculated to injure the rights of the defendant. *Arline v. State*, 721 S.W.2d 248, 351 (Tex. Crim. App. 1986). The defendant must have suffered "some" actual, rather than theoretical harm from the error. *Id.* The harmfulness of the charging error must be considered in the context of the entire record. *Id.* at 352. The concurrent opinion invited this Court "to address and clarify" the "substantive border between theoretical and actual harm" and to describe the "point at which harm evolves from 'theoretical' into 'actual' harm." *See Smith*, 522 S.W.3d at 641-42 (Jewell, J., concurring). After applying the *Almanza* factors to this case, the concurrent opinion properly concluded "any likelihood that the jury would have construed the instruction as a directive to not consider the voluntary intoxication evidence is not sufficient to constitute actual harm." *See id.* at 642.

i. The Entire Charge

The jury was instructed that "[v]oluntary intoxication does not constitute a defense to the commission of a crime." The jury was never instructed to disregard the evidence of appellant's voluntary intoxication in assessing punishment. The jury was also instructed it could consider "all the facts shown by the evidence admitted before you in the full trial of this case." (CR at 417). Without contrary evidence, it is presumed the jury followed the instructions set out in the charge. *Hutch*, 922 S.W.2d at 170.

The dissent takes issue with the placement of the instruction as allowing for the possibility of applying it only to the extraneous offenses. *See Smith*, 522 S.W.3d at 650 (Christopher, J., dissenting). The concurring suggests, as the State argued, that the instruction was followed by an "explicit directive to consider all of the evidence." *See id.*, at 643 (Jewell, J., concurring). The jury "could have construed and applied both instructions without inconsistency based on the evidence and arguments presented." *See id.* The concurring also added the court admitted all of appellant's evidence on voluntary intoxication, the trial court never instructed the jury not to consider that evidence, and there is zero indication the jury was confused about whether it could consider the evidence. *See id.*

Appellant argues a case out of the Seventh Circuit is "nearly identical to the present case and reversed for a new punishment hearing."[8] Appellant cites to *Baer v. Neal*, 879 F.3d 769 (7th Cir. 2018). Baer argued his trial counsel was ineffective for failing to object to the jury charge that included the following instruction:

> Defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of the law was substantially impaired as a result of mental disease or defect.

Id. at 777. Baer's counsel did not object that the instruction failed to include "or intoxication" at the end of the instruction. *Id.* Additionally, the following instructions were given:

> Intoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the defendant meets the requirements of [Indiana Code] 35-41-3-5.
>
> [Indiana Code] 35-41-3-5: It is a defense that the person who engaged in the prohibited conduct did so while intoxicated, only if the intoxication resulted from the introduction of a substance into his body: (1) without consent; or (2) when he did not know the substance might cause intoxication.

Id. Baer's counsel also failed to object to this "voluntary intoxication" instruction. *Id.* Baer argued his trial counsel was ineffective for failing to object to the "removal

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[8] Appellant's Brief at 28.

of a mitigating factor from jurors' consideration." *Id.* In relevance, the Seventh Circuit found:

> At the end of the instructional charge, the trial court expressly told jurors they could not consider intoxication unless it was involuntary. In light of the voluntary intoxication instruction, reasonable jurors would not have believed they could consider intoxication evidence as it related to Baer's mental health. Instead, it is likely jurors heeded the trial court's charge and refused to consider voluntary intoxication at all, including mental health evidence stemming from Baer's voluntary drug use. It is unreasonable to assume jurors could catch the nuance that voluntary intoxication can be considered for mitigation, but not as evidence of criminal intent, without any clear instruction. Here, the instructions relating to mitigation did not mention the word "intoxication," as they should have under the statute. In fact, the only instruction addressing intoxication rendered Baer's use of methamphetamine and other drugs out of bounds for consideration for any purpose. *The modification of the statutory mitigating factor worked in conjunction with the voluntary intoxication instruction to effectively exclude consideration of key mitigating evidence.* Therefore, defense counsel's failure to object was constitutionally deficient.

Id. at 779. The court further noted "the challenged voluntary intoxication instruction was given at the penalty phase trial —after Baer had been convicted of intentionally committing his crimes. Intent was not challenged before the jury at the penalty phase; it was decided at the guilt phase. So, it is unlikely the jury understood that this instruction, given again at the penalty phase, was applicable only to the decided issue of intent." *Id.* Applying the *Strickland* standard of review,

the federal court then continued to determine if Baer was prejudiced by his trial counsel's failure to object. *Id.*; *see also Strickland v. Washington*, 466 U.S. 668 (1984). The court found Baer was prejudiced based upon his counsel's failure to object when his entire defense was based upon his mental health and methamphetamine use. *Id.*

Appellant argues he was harmed much in the same way Baer was prejudiced. Unlike in *Baer*, however, there was no modification of a mitigation statute and the "voluntary intoxication" statute went to all offenses, especially extraneous offenses, and did not limit the court's consideration of the evidence to "existence of a mental state that is an element of the offense." Accordingly, the first *Almanza* factor does not indicate actual harm. *See id.* at 644.

ii. Argument of Counsel

The arguments of both the State and the defense correctly interpreted the law: separating out the difference between voluntary intoxication as a defense to an offense and voluntary intoxication as mitigation.

In closing argument, trial counsel stated:

> Judge Clark also talks about voluntary intoxication in his instructions. It is not a defense to the commission of a crime, he tells you...
>
> That's not what [co-counsel] and I feel like we would like you to consider. You heard from Dr. Terry Rustin. ... *We're*

> *not here to tell you the fact that somebody uses Xanax and the effect of that is in any way an excuse for the behavior in this case at all.*
>
> *What we are suggesting to you is that our law allows us to bring you evidence in the punishment phase of any trial that you may consider as mitigation.* That can be a whole lot of things; where a person grew up, how they were raised, their educational background, their mental capacity. All of those are something, if you have that evidence, you can consider. In this case what you have is testimony from a health care expert that talks about drug use. So I suggest to you that the defense in this case isn't suggesting that taking Xanax is an excuse for behavior at all.

(RR7 at 185-86) (emphasis added). The second trial counsel also addressed this issue in closing argument:

> I brought you Dr. Rustin, and Dr. Rustin told you we sent him over there just to talk to him about drug and alcohol use. That's all he came here to testify to. And he came here to tell you what Xanax does to you. I asked him: Dr. Rustin, does that excuse my client's behavior? No. Does it justify his behavior? No. We're not here to tell you that somehow him taking this Xanax excuses his behavior or justifies his behavior; it does not. It merely explains it.
>
> What's happened to him has happened to many young people in our society. They've fallen into this trap, and it has caused him to commit a terrible crime of aggravated robbery, which you are about to punish him for. Remember that the road leading up to those misdemeanors and other stuff and taking those drugs and what it caused him to do, I'm not trying to condone it; I'm just explaining to you why it happened.

(RR7 at 190).

The State also addressed appellant's drug use as a mitigation issue:

> They also want you to give some credence to Dr. Rustin and treat that as mitigation for the defendant's actions today. There is no - - I repeat - - no mitigation for his activity. He's the one that chose to put that Xanax in his mouth. He didn't have a prescription for it. He chose to take it. He now must face the consequences of his actions.
>
> Now, what they brought to you was a paid expert, only examined the defendant one time for three hours. You heard that there's no report from that doctor. You also heard that it was the defendant's own self-serving statements that he was basing his opinion off of. And don't you know they were self-serving, because he didn't admit to all his criminal history. He didn't admit to his involvement in these crimes. That's how you know. You can't really take much of it. He wants you to believe that his findings are based on this Xanax addiction that the defendant has.
>
> There's no prescription. This is all illegal narcotics use. You can see that the defendant's behavior and his actions are very violent and very unpredictable. When he doesn't get his way, he beats up someone, beat the crap out of them until they are unconscious. This is not an excuse for his actions. He's still accountable for everything that he did. This was merely a lame attempt by the defense to get you to lessen his punishment. Don't fall for it. Don't go for it because you know it's not right; it's not.

(RR7 at 201-02).

Thus, in closing argument, the State and the defense explained that Dr. Rustin was called for mitigation purposes. The State properly responded that his voluntary illegal narcotics use should not mitigate his punishment. *See Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000) (proper jury argument includes four areas: (1) summation of the evidence presented at trial, (2) reasonable

deductions drawn from that evidence, (3) answer to the opposing counsel's argument, or (4) a plea for law enforcement). The concurring opinion correctly notes the State never told the jury not to consider the evidence, but that they should not believe it because Dr. Rustin was not a credible witness. *Smith*, 522 S.W.3d at 644 (Jewell, J., concurring). Accordingly, the second factor of *Almanza* fails to indicate actual harm. *See Arline*, 721 S.W.2d at 353.

iii. The Evidence

The jury heard evidence of the charged offense and "a litany of other extraneous crimes and bad acts." *See Smith*, 522 S.W.3d at 645 (Jewell, J., concurring). Most pertinently:

> There was evidence that appellant participated in a murder where the victim was shot in the head while sitting in an automobile. That homicide occurred the day before appellant committed the charged offense of aggravated robbery with a deadly weapon, which unfolded with appellant brandishing a gun and approaching the victim in his car —much like the circumstances of the extraneous homicide. On multiple jail phone recordings, appellant is heard discussing how he tried to "pull the trigger" twice while committing the charged offense, only to have his gun "jam." On one recording, appellant also discussed the homicide. Notably, the only evidence the jury asked to re-hear during its punishment deliberations was one of the phone recordings. The jury heard evidence that appellant sold drugs and was "high on Xanax" a "lot of times." There was also evidence appellant committed multiple assaults against family members and others, including beating a jail inmate unconscious merely to obtain a private cell.

Id. (citation omitted). The jury was also fully aware that appellant had a Xanax problem, and there was considerable testimony to that effect. Dr. Rustin testified exclusively about appellant's Xanax use and the effects Xanax has on the human body. (RR7 at 120-25). Dr. Rustin testified his opinion about appellant was based only upon interviewing appellant once, "who self-reported his own usage." *See Smith*., 522 S.W.3d at 645 (Jewell, J., concurring). The doctor never claimed to see any medical records supporting appellant's claims and no medical records were offered into evidence. Additionally, the jury would likely have disregarded much of this testimony, as Dr. Rustin had to admit that appellant was still violent even when he was not under the effects of Xanax. (RR7 at 158-61). Appellant's extreme aggression and self-centered interests manifested when he beat another prisoner unconscious in order to get a jail cell to himself. (RR6 at 52-54; RR7 at 158-61). As the concurring opinion states, "Even considering the totality of appellant's voluntary intoxication evidence heard by the jury, it is not reasonably likely the jury afforded it more than nominal weight, if any, based on this record." *See id.* at 646 (Jewell, J., concurring).

iv. Other Relevant Information

Lastly, the concurring opinion adds (1) the trial court informed the jury it was free to consider all evidence admitted and the jury was never told not to consider the evidence of intoxication; (2) there was no jury note indicating the jury was confused; and (3) appellant's trial counsel argued the jury could give the lesser punishment based upon Dr. Rustin's testimony, and the jury did not do so. *See id.* at 646.

While the dissent added the trial court's justification for allowing it in (so the jury would not be confused) is "startling" and calculated to injure appellant's rights, the concurrent opinion correctly avers "the trial court's rational" and "motivation" "right or wrong" "could not have caused actual harm because the jury did not hear it." *See id.* at 651-52 (Christopher, J., dissenting); *Id.* at 646-47 (Jewell, J., concurring). Furthermore, the trial court specifically stated "I'm going to allow y'all to argue the mitigation aspect of this" before adding the court's desire to prevent confusion. (CR7 at 165).

Considering the entire record, including the charge, the evidence presented at trial, and the arguments of the parties, appellant did not suffer "some actual" harm. *Arline*, 721 S.W.2d at 351. Because the majority correctly found no error with the inclusion of the section 8.02(a) instruction in the jury charge, and,

alternatively, the concurring opinion properly determined that any error was harmless in light of the record and the evidence presented, appellant's first ground for review should be overruled.

STATE'S RESPONSE TO APPELLANT'S SECOND GROUND

Restated Ground Second: The inclusion of an 8.04(a) instruction at punishment violates the Due Process Clause because it could mislead a rational jury into believing that it could not — as a matter of law — consider a defendant's drug-addiction evidence as mitigation; thus the court of appeals's holding that it is not a charge error conflicts with applicable holdings of the U.S. Supreme Court.

In his second ground for review, appellant argues the inclusion of the 8.04(a) instruction violated due process in conflict with the United States Supreme Court. Because this ground for review was neither preserved nor argued to the intermediate court of appeals, this ground presents nothing for this Court's review and should be dismissed as improvidently granted.

ANALYSIS

A. This Issue Is Neither Ripe Nor Preserved for Review

Appellant never argued, and thus the Fourteenth Court of Appeals never addressed, appellant's due process complaint. This Court reviews the decisions of the court of appeals, and if the court of appeals did not address and resolve a particular issue, this Court has nothing to review on discretionary review. *Benavidez v. State*, 323 S.W.3d 179, 183 & n. 20 (Tex. Crim. App. 2010) (in its discretionary review capacity, this Court reviews "decisions" of the courts of

appeals, and an issue that lower court did not pass upon is not ordinarily ripe for our review); *Ex parte Brooks*, 312 S.W.3d 30, 33 (Tex. Crim. App. 2010) (same); *Smith v. State*, 309 S.W.3d 10, 19 (Tex. Crim. App. 2010) (same); *Stringer v. State*, 241 S.W.3d 52, 59 (Tex. Crim. App. 2007) (same); *Lee v. State*, 791 S.W.2d 141, 142 (Tex. Crim. App. 1990) (same).

Furthermore, appellant never preserved this issue in the trial court. In order to present an issue for appellate review, the record must show that a complaint was made to the trial court by a timely request, objection, or motion. TEX. R. APP. P. 33.1(a)(1). The point of error on appeal, also, must correspond with the objection made at trial. An objection at trial stating one legal theory may not be used to support a different legal theory on appeal. At trial, appellant never argued the inclusion of the voluntary intoxication instruction violated his due process rights under the United States and Texas constitutions. A defendant can waive complaints of due process violations by failing to object in the trial court. *Anderson v. State*, 301 S.W.3d 276, 280 (Tex. Crim. App. 2009) ("Indeed, our prior decisions make clear that numerous constitutional rights, including those that implicate a defendant's due process rights, may be forfeited for purposes of appellate review unless properly preserved."). Because appellant's ground for review was neither

preserved nor argued to the intermediate court of appeals, this ground presents nothing for this Court's review.

B. Including the Instruction Did Not Violate Due Process

Mitigating evidence is not specifically defined in the Texas Penal Code other than in article 37.071(f)(4) of the Texas Code of Criminal Procedure, which applies to sentencing in capital cases. TEX. CODE CRIM. PROC. ANN. art. 37.071(f)(4). In a capital case, the court shall charge the jury to "consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." *Id.* Mitigating circumstances are considered by a jury in capital cases to determine whether to assess a sentence of life imprisonment rather than a death sentence. TEX. CODE CRIM. PROC. ANN. art. 37.071(e)(1); *see generally Guidry v. State*, 9 S.W.3d 133, 139 n. 3 (Tex. Crim. App. 1999).

Even assuming the inclusion of the voluntary intoxication instruction was erroneous, appellant was not prohibited from presenting a defense in the form of mitigation testimony; nor was he prohibited from introducing defense witnesses. Testimony was elicited from appellant's punishment witness concerning his alleged Xanax addiction, his behavior while intoxicated on Xanax, and that he was intoxicated for the charged crime and most extraneous or bad acts presented by

the State. Furthermore, review of jury-charge error in Texas, under Texas Code of Criminal Procedure article 36.19, falls within two categories: "fundamental error" and "ordinary reversible error." *See Almanza*, 686 S.W.2d at 171. Consequently, under a traditional *Almanza* harm analysis, appellant was required to show that the error was so egregious as to deprive him of a fair and impartial trial. Appellant's argument on this issue does not differ from his harm argument under his first ground for review. The error which appellant complains of here is not "fundamental;" it was not so egregious as to deprive appellant of a fair and impartial trial. Appellant's second ground for review should be dismissed as improvidently granted or overruled.

STATE'S RESPONSE TO APPELLANT'S THIRD GROUND

Restated Ground Three: In its harm analysis of the State's unconstitutional jury argument, the court of appeals did not address how that argument highlighted inadmissible evidence and how it impermissibly increased the likelihood that the jury punished appellant for an extraneous crime.

In his third ground for review, appellant argues the intermediate appellate court, after presuming the State improperly commented on his demeanor during closing argument, "did not address how that argument highlighted inadmissible evidence and how it impermissibly increased the likelihood that the jury punished and that the trial court erred in overruling trial counsel's objection." In light of all the evidence, the State's one-line comment did not contribute to appellant's punishment. This error was not "reasonably likely to have caused such prejudice as to distract the jury or divert it from its proper fact-finding role." *See Snowden v. State*, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011). Because the majority opinion correctly determined appellant suffered no harm from the State's comment, this ground for review should be overruled.

STANDARD OF REVIEW

A comment on the defendant's failure to testify violates the privilege against self-incrimination and the freedom from being compelled to testify. *Bustamante v.*

State, 48 S.W.3d 761, 764 (Tex. Crim. App. 2001). To violate this right, the offending language must be viewed from the jury's standpoint and the implication that the comment referred to the defendant's failure to testify must be clear. *Id.* at 765. It is not sufficient that the language might be construed as an implied or indirect allusion. *Id.* The test is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify. *Id.* Commenting on a defendant's failure to show remorse during trial is tantamount to a failure to testify when the record fails to reflect evidence of the defendant's actions during that trial. *Davis v. State*, 782 S.W.2d 211, 222 (Tex. Crim. App. 1989).

When the State impinges upon an appellant's privilege against self-incrimination under the constitution of the United States or Texas, it is constitutional error. *Snowden*, 353 S.W.3d at 818. A reviewing court must analyze a constitutional error under Texas Rule of Appellate Procedure 44.2(a), reversing the judgment unless it can conclude beyond a reasonable doubt that the error did not contribute to the defendant's conviction or punishment. *Id.*; *see* TEX. R. APP. P. 44.2(a). When a trial court commits constitutional error some nonexclusive factors to consider include:

- the nature of the error;
- whether the error was emphasized by the State;
- the probable implications of the error;
- the weight the jury would likely have assigned to it in the court of its deliberations.

Snowden, 353 S.W.3d at 822. "At bottom, an analysis for whether a particular constitutional error is harmless should take into account any and every circumstance apparent in the record that logically informs an appellate determination whether beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment." *Id.*

RELEVANT FACTS

The following happened during closing argument:

> **State**: You heard his sister testify about the funeral service and having to cover up that wound in the head, and you heard about his children. And I hope that during that testimony you got an opportunity to see how the defendant reacted to that. Nothing, absolutely nothing; never a sign of remorse, never; never a sign of remorse. That is just plain wrong. That is evil, that is something you don't want in our community.
>
> **Trial counsel**: That's improper argument. She's arguing outside the record of what the accused may look like during testimony. I submit it's not evidence.
>
> **Court**: Overruled.

(RR7 at 203-04).

ANALYSIS

The majority opinion presumed,[9] for the sake of argument, that the State's comment was improper before conducting a harm analysis under Rule 44.2(a). *See Smith*, 522 S.W.3d at 638. After weighing the factors set out in *Snowden*, and considering all the circumstances in the record, the majority concluded the one-line comment by the State did not contribute to appellant's punishment.

The majority noted the act of overruling appellant's objection to the comment gave the jury the impression that it could consider the comment and weight in favor of harm. *See Smith*, 522 S.W.3d at 637. The improper comment made by the State is similar to the one made in *Snowden*, in which the State commented that the defendant lacked remorse at the time of the assault, "just like he is today." *See Snowden*, 353 S.W.3d at 824. Even if, by calling the jury's attention to appellant's exercise of his Fifth Amendment right during the punishment phase, his rights were violated, the other *Snowden* factors indicate that appellant was not harmed by the error.

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[9] The dissent would rule it "error" and not "presumed error," but appears to agree with the majority's conclusion that appellant was not harmed. *See Smith*, 522 S.W.3d at 652 n.3 (Christopher, J., dissenting).

As in *Snowden*, the error was isolated, and imbedded in a legitimate argument that invited the jury to draw an inference of lack of remorse at the time of the offense – an inference that could reasonably be derived from the evidence at trial. The State had admitted and played before the jury multiple jail calls – in which appellant expressed a lack of remorse for the victims and focused on what the situation meant for appellant. (State's Exhibits 26-27). The State's argument focused on appellant's culpability and punishment of appellant as a violent person. After the objection was overruled, the State did not again mention his lack of remorse. This lack of emphasis on his failure to testify limits the weight the jury would likely have assigned to improper remarks, the fourth *Snowden* factor.

The record supports the State presented a strong case against appellant and there was significant evidence supporting his punishment. The jury had before it an aggravated robbery that occurred the day after appellant murdered someone. Appellant tried to pull the trigger of the gun against Wiener as well. (State's Exhibit 27). The capital murder of Hong Le was presented in the punishment phase, and appellant's prints were in Le's car. (RR6 at 213-17; State's Exhibits 160, 165). Appellant told a neighbor he shot an Asian man that morning. (RR6 at 269-70). Appellant's prior criminal history was admitted, including thefts, drug charges, and a family violence assault. (RR6 at 25-29; State's Exhibits 100-05).

In jail calls, appellant discussed trying to get out and disconnect himself from the evidence. (State's Exhibits 26-27). Even after he was confined, when he was told that he was not classified to have a cell to himself, he beat another inmate unconscious in the view of a detention officer so that he could be segregated in a cell by himself. (RR6 at 53-55; RR7 at 161). The prosecutor's comment did not inject new or harmful facts. The majority properly considered appellant's violent conduct, disregard for others, and concern for his future with no indications of remorse and concluded the jury would have assigned little weight to the improper comment during deliberations. *See Smith*, 522 S.W.3d at 638-39.

Furthermore, the jury charge contained a written instruction, on its own page in the jury instructions, specifically stating that the defendant's failure to testify in the punishment phase of trial could not be held against him. (CR at 416). In fact, appellant's Fifth Amendment right not to testify was covered throughout the trial – it was covered by the trial court, the State, and defense counsel during voir dire; it was also in the jury instructions in the guilt/innocence phase of trial. (RR3 at 10-11, 43-46, 108-09; CR at 403). Thus, the instructions in the jury charge and the extensive discussion by all parties about appellant's right not to testify mitigated any effect of the State's improper argument.

In light of all the evidence, the State's one-line comment did not contribute to appellant's punishment. This error was not "reasonably likely to have caused such prejudice as to distract the jury or divert it from its proper fact-finding role." *Snowden*, 353 S.W.3d at 822. Because the majority opinion correctly determined appellant suffered no harm from the State's comment, this ground for review should be overruled.

PRAYER

The State respectfully requests this Court affirm the majority or concurring opinion from the Fourteenth Court of Appeals.

KIM OGG
District Attorney
Harris County, Texas

/s/ *Bridget Holloway*

BRIDGET HOLLOWAY
Assistant District Attorney
Harris County, Texas
1201 Franklin Suite 600
Houston, Texas 77002
713.274.5826
Texas Bar No. 24025227
holloway_bridget@dao.hctx.net

CERTIFICATE OF SERVICE AND WORD LIMIT COMPLIANCE

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Sarah Wood
Assistant Public Defender
Email: sarah.wood@pdo.hctx.net

Stacey M. Soule
State Prosecuting Attorney
Email: stacey.soule@spa.texas.gov

/s/ *Bridget Holloway*

BRIDGET HOLLOWAY
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
713.274.5826
Texas Bar No. 24025227
holloway_bridget@dao.hctx.net